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In The

Supreme Court of the United States

October Term, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF TEXAS INVESTMENT BANK, N.A.,

Petitioner,

v.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, AND MICHAEL D. MALOY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT, KIRK K. WEAVER

J. MICHAEL DORMAN
Counsel of Record

JAMES E. ESSIG
JOHN RAINEY
LIDDELL, SAPP, ZIVLEY,
HILL & LABOON, L.L.P.
3400 Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200
(713) 223-3717 (FAX)

Counsel for Respondent
Kirk K. Weaver

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION RESTATED

May a federal court consider state tolling principles when deciding whether a state-created right expired under a state statute of limitations?

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FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF TEXAS INVESTMENT BANK, N.A.,

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ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, AND MICHAEL D. MALOY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT, KIRK K. WEAVER

Respondent Kirk K. Weaver respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner's Appendices provide the pertinent opinions.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254.

SUMMARY

The Federal Deposit Insurance Corporation ("FDIC") asks this Court to create a federal common-law rule requiring the application of federal tolling principles when the FDIC, as receiver of a failed bank's assets, asserts the bank's expired state law claims against its former officers or directors. The FDIC, however, omits one essential fact from its petition for writ of certiorari: the claims involved in these cases by the FDIC against former officers and directors of failed institutions are entirely creatures of state law. That fact is critical because this Court has long held that "if a plea of the statute of limitations would bar recovery in a State court [on a state law claim], a federal court ought not to afford recovery." *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945).

Although this Court based its decision in *York* on the federalism principles articulated in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), it does not depend on diversity jurisdiction. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938) ("*Guaranty Trust Co.*") (United States cannot rely on equitable principles to defeat state statute of limitations when claim expired before United States acquired it; jurisdiction premised on United States as party); *Austrian v. Williams*, 198 F.2d 697, 702 (2d Cir.) ("state statutes of limitations must be applied as interpreted by the state

courts," where state law claim is brought under Bankruptcy Act), *cert. denied*, 344 U.S. 909 (1952). That the claims in this case derive entirely from state law is also critical because this Court has held that the creation of a federal common law rule is inappropriate when "state law governs the controvers[y]." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718, 99 S.Ct. 1448, 1453 (1979).

That these claims derive from state law also establishes the lack of any conflict between the Fifth Circuit's opinion in this case and the Tenth Circuit's opinion in *Farmers & Merchants National Bank v. Bryan*, 902 F.2d 1520 (10th Cir. 1990).[1] The *Bryan* case dealt with federal statutory, not state law causes of action. The *Bryan* court considered only whether Federal tolling principles should apply when a federal court "borrows" a state statute of limitations because no federal statute applies to the federal claim. In *Dawson*, however, the court did not "borrow" a state statute of limitations. Rather, the court applied the Texas statute of limitations to a Texas law claim. *See, e.g., FDIC v. Dawson*, 4 F.3d 1303, 1308-09 (1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar.

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[1] In fact, a careful reading of the *Bryan* decision by the Tenth Circuit, the order of the District Court and the briefs of the appellants and appellees show that the only issues in *Bryan* involved federal causes of action. *See* attached excerpts from the appellant's brief (Appendix C, at App. 9) and the FDIC's brief (Appendix D, at App. 14 and App. 17) filed in *Bryan*. While the Fifth Circuit in its *Dawson* opinion noted that *Bryan* appeared to involve similar issues to the case presented here, in fact, the differences are crucial, because *Bryan* did not involve the issue of whether state tolling principles apply when the FDIC is suing under a state law cause of action.

21, 1994) (No. 93-1486) (court does not borrow state statute of limitations when FDIC asserts state law claim). And under this Court's consistent precedent, which the FDIC fails to discuss, the Fifth Circuit was proper in attempting to apply the Texas statute in the same manner as the Texas courts.

The *Bryan* court, moreover, failed to consider precedent from this Court that makes state law the "primary guide" even when the court must apply a state statute of limitations to a federal law claim. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64, 95 S.Ct. 1716, 1722 (1975). *See also Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992) ("*Johnson* and subsequent cases have held that, when a federal court borrows a state statute of limitations, it should borrow any applicable state tolling provision as well"). Thus *Bryan* does not conflict with the Fifth Circuit's opinion in *Dawson*, and is not authority for the FDIC's contention that federal tolling principles should apply to state law claims.

The FDIC seeks the application of federal tolling principles to these state law claims in the hope of reviving claims that expired under state law before the FDIC acquired them. The principle is well-established, however, that the transfer of an expired claim to the United States or one of its agencies will not revive it. *Guaranty Trust Co.; United States v. Buford*, 28 U.S. 12 (1830) ("the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor"). Furthermore, the circuit courts have uniformly applied this principle to the FDIC's acquisition of expired state law claims. *See, e.g., FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC v. Hinkson*, 848 F.2d 432,

434 (3d Cir. 1988); *FDIC v. Dawson*, 4 F.3d 1303, 1309 (1993) *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486); *FDIC v. Rogier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993). Accordingly, the FDIC cannot rely on its equitable position as receiver in seeking the application of federal tolling principles to these state law claims because it did not own the claims when they expired. *See, e.g., Guaranty Trust Co.*, 304 U.S. at 142, 58 S.Ct. at 793 (1938) (equitable principles applicable to United States as sovereign did not revive claim that expired before assignment to United States); *Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events").

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 1990, nearly three years after being appointed as receiver for Texas Investment Bank, N.A. ("TIB"), the FDIC sued a former TIB vice-president and member of the TIB loan committee, Wayne C. Desselle.[2] In that complaint, the FDIC alleged that Desselle approved a series of unsound loans, the last of which occurred almost six years earlier. In addition, the FDIC sued two officers and directors of TIB, Rockleigh S. Dawson, Jr., and Michael D. Maloy, who were members of the TIB loan committee, alleging that they breached their fiduciary duties by failing to supervise Desselle's activities properly, and by approving unsound loans while

[2] The FDIC brought suit as a result of the activities of a TIB loan committee that operated from December 31, 1980 until August 27, 1984. Neither Weaver nor any other outside director was a member of that committee.

members of the committee.[3] The FDIC also sued one of TIB's seven outside directors, Weaver, in the mistaken belief that Weaver was a member of the loan committee. *See* Appendix A, at App. 1.

In fact, the FDIC did not initially allege a theory that encompassed Weaver (or any outside director). Rather, it pleaded that members of the loan committee failed to supervise Desselle properly, and it conceded as long ago as January 31, 1991, that Weaver was not a loan committee member. *See* Appendix B (FDIC's Answer to Interrogatories, at App. 5-6).

When Desselle did not respond to the FDIC's motion for summary judgment, the district court entered judgment against him. Dawson and Weaver, in turn, moved for dismissal on the merits, and on the grounds that the statute of limitations barred the FDIC's claims. The district court agreed, finding that the FDIC's claims accrued no later than October 5, 1984, the date of the last challenged loan. Thus, the claims expired under the Texas two-year statute of limitations for torts on October 5, 1986, nearly a year before the United States Office of the Comptroller of the Currency ("OCC") appointed the FDIC as receiver.

Because the statute of limitations clearly expired on the FDIC's claims absent some reason to toll the statue, the FDIC sought to invoke the equitable doctrine of adverse domination. Under that doctrine, the statute of

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[3] Dawson was president and chairman of the loan committee, and Maloy was a loan officer and vice-chairman of the loan committee.

limitations tolls when wrongdoing directors exercise control over a corporation such that shareholders could not reasonably bring suit during the limitations period. *See, e.g., FDIC v. Howse*, 736 F. Supp. 1437, 1441-42 (S.D. Tex. 1990).

The FDIC's pleadings, however, did not support its allegations of adverse domination. Under what is referred to as the "majority test," some jurisdictions require that the plaintiff sue a majority of the board of directors. *Id.* Other jurisdictions apply an even stricter test, requiring proof that the wrongdoing directors exercised complete domination over the board. Under this "complete domination test," the plaintiff must show "full, complete and exclusive control in the directors or officers charged." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (quoting *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 414 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967)). In addition, "the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." *Mosesian*, 727 F.2d at 879; *Int'l Rys.*, 373 F.2d at 414.

Because the FDIC's allegations of wrongdoing against just three directors would not support adverse domination under either theory, the FDIC asserted for the first time in its opposition to the directors' motions for summary judgment that all of the directors, including those that it chose not to sue, were negligent in their supervisory responsibilities. The district court rejected this theory, however, because the defendants at no time amounted to a "majority of the board of directors." FDIC's Appendix B, p. 26a.

In affirming, the Fifth Circuit decided, as a preliminary issue, that whether the FDIC acquired a viable state law claim under the Texas statute of limitations is a state law question. *Dawson*, 4 F.3d at 1308. The Fifth Circuit's decision to consult Texas limitations law, in fact, was highly favorable to the FDIC because the Fifth Circuit found that Texas does not require that the plaintiff sue a majority of the board, and does not require that the culpable directors completely dominate the board. *Id.* at 1310-11. According to the Fifth Circuit, in order to defeat the summary judgment, the FDIC merely had to create a fact issue on whether a majority of the board were "active participants in wrongdoing or fraud, rather than simply negligent." *Id.* at 1312.

The FDIC, however, failed to meet even this lenient test. *Id.* at 1312-13. The FDIC's summary judgment evidence, the circuit court found, raised a fact issue only on whether the six unnamed outside directors were negligent in failing to detect and prevent the wrongdoing of others. *Id.* To toll the statute in such circumstances, the Fifth Circuit reasoned, "would effectively eliminate the statute of limitations in all cases involving a corporation's claims against its own directors" because "it could almost always be said that when one or two directors actively injure the corporation, or profit at the corporation's expense, the remaining directors are at least negligent for failing to exercise 'every precaution or investigation.' " *Id.* at 1312. "If adverse domination theory is not to overthrow the statute of limitations completely in the corporate context," the Fifth Circuit held, it cannot apply when the directors' alleged culpability amounts only to negligence in failing to detect the wrongdoing of others. *Id.*

In fact, this case illustrates why mere negligence should not toll the statute, the Fifth Circuit reasoned. *Id.* The board never attempted to conceal any deficiencies in its loan practices from "the OCC or anyone else." *Id.* Nor did the FDIC's evidence "suggest that an organized majority coalesced to prevent any other parties from discovering the problems." *Id.* Thus no rationale existed for tolling the statute. *Id.; see also Burt v. Irvine Co.*, 237 Cal.App.2d 828, 47 Cal.Rptr. 392 (1965) (adverse domination "cannot be applied to a cause of action predicated upon negligence"); *Whitten v. Dabney*, 171 Cal. 621, 154 P. 312, 315 (1915).

REASONS FOR DENYING THE PETITION

A. State Law Determines Whether A State Statute Of Limitations Bars A State Law Claim.

The FDIC omits to mention in its petition that the claims involved in this case are entirely creatures of state law. That fact is critical because, based on federalism principles extending back to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), this Court long has held that state law determines whether a state statute of limitations bars the assertion of a state law claim. *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945). This principle applies, moreover, regardless of the basis for federal court jurisdiction. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938) (federal court jurisdiction established because the United States was a party); *Austrian v. Williams*, 198 F.2d 697, 702 (2d Cir.) (under Bankruptcy Act), *cert. denied*, 344 U.S. 909 (1952).

In addition, this Court consistently has held that the transfer of a claim to the United States or one of its agencies will not revive a stale claim. *Guaranty Trust Co.*, 304 U.S. at 142, 58 S.Ct. at 793 (1938); *see also FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC v. Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988); *Dawson*, 4 F.3d at 1309; *FDIC v. Rogier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993).

In *Guaranty Trust Co.*, the United States acquired a claim for funds on deposit with the Guaranty Trust Company from the government of the Union of Soviet Socialist Republics as part of a treaty recognizing that government. Guaranty Trust argued that it could retain the funds because the New York statute of limitations had run against the Soviet government. The United States, on the other hand, argued that its position as sovereign barred the operation of the New York statute.

This Court rejected the Government's equitable arguments, reasoning that because the statute of limitations had already run against the Soviet government, "[t]he United States never acquired a right free of pre-existing infirmity." *Id.* at 304 U.S. at 141-42, 58 S.Ct. at 793. Thus the statute of limitations did not deprive the United States of any right. *Id.* Furthermore, regardless of the Government's equitable position, public policy did not forbid "the running of limitations against its assignor." *Id.*

In this case, just as in *Guaranty Trust Co.*, the FDIC has not been deprived of any right because it "never acquired a right free of pre-existing infirmity." Furthermore, just as in *Guaranty Trust Co.*, public policy did not

forbid the running of the Texas statute against TIB before the FDIC acquired the claim. Thus the FDIC cannot rely on its position as receiver with regard to pre-receivership events. *See also Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events").

In *Austrian*, the Second Circuit considered whether a federal court must apply a state statute of limitations in the same manner as the state courts when a trustee in bankruptcy asserts the claim. 198 F.2d at 699. The district court, rather than following state tolling principles, applied a federal equitable rule, the equivalent of adverse domination, that tolled the statute during the time that the party who committed the fraud concealed the wrongdoing. *Id.* 700.

The Second Circuit reversed, holding that the "clear mandate to apply the state limitations statute in a case like this includes its application in the manner established by other relevant provisions of state law, and state court interpretations of state law." *Id.* at 701 (citations omitted). The *Austrian* court distinguished this Court's decision in *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 583 (1946), which considered equitable tolling principles in the context of a borrowed statute of limitations. *Id.* (citing to *Holmberg*). *Holmberg* did not require a different result, the court reasoned, because "the state statue of limitations was being applied [in *Holmberg*] to a federally created cause of action while here the cause of action is state created." *Id.* These cases, which the FDIC fails to discuss, establish that state tolling law governs the viability of state law claims.

B. No Conflict Exists With The Tenth Circuit's Opinion In *Bryan*.

Contrary to the FDIC's assertions, a conflict in the circuits does not exist on whether a federal court must consider state tolling law when deciding whether a state law cause of action expired under a state statute of limitations. In fact, the circuits uniformly have held that state tolling principles apply when the FDIC asserts state law claims. *Dawson*, 4 F.3d at 1308; *FDIC v. Cocke*, 7 F.3d 396, 399 (4th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1483); *Resolution Trust Corp. v. Seale*, 13 F.3d 850 (5th Cir. 1994) (following *Dawson*); *FDIC v. Consolidated Mortgage Finance Corp.*, 805 F.2d 14, 18 (1st Cir. 1986); *Resolution Trust Corp. v. Everhart*, 837 F.Supp. 155 (E.D.Va. 1993) (following *Cocke*).

In alleging a conflict, the FDIC relies solely on *Farmers & Merchants National Bank v. Bryan*, a case that solely involved federal statutory causes of action. 902 F.2d 1520 (10th Cir. 1990). The *Bryan* court did not consider the application of federal tolling principles to state law claims. Rather, the court "borrowed" a state statute of limitations because Congress prescribed no federal statute of limitations for the violations of the National Banking Act, 12 U.S.C. §§ 84, 93, at issue in that case. The district court in this case, however, did not "borrow" a state statute of limitations when it applied the Texas statute to a Texas claim. *See, e.g., Dawson*, 4 F.3d at 1309 (federal courts do not "borrow" state statute of limitations when the FDIC asserts a state law claim in its role as receiver of a failed bank).

The *Bryan* court's decision to consult federal tolling principles when enforcing a federal statutory cause of

action does not conflict with the Fifth Circuit's decision to consult state tolling principles when enforcing a state law claim. Furthermore, as the Seventh Circuit noted in *Smith v. City of Chicago Heights*, 951 F.2d 834 (7th Cir. 1992), the Tenth Circuit's decision in *Bryan* is of questionable validity in light of recent precedent from this Court holding that state tolling law is the "primary guide" when "borrowing" a state statute of limitations. *Id.* at 839 ("*Johnson* and subsequent cases have held that, when a federal court borrows a state statute of limitations, it should borrow any applicable state tolling provision as well") (citing *Johnson v. Ry. Express Agency*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722 (1975)). Under these cases, a federal court may disregard the state tolling law only if it is inconsistent with federal policy. *See also Board of Regents v. Tomanio*, 446 U.S. 478, 485-86, 100 S.Ct. 1790, 1995-96 (1980). Thus "[t]he *Bryan* court . . . misread the current law regarding the proper source of tolling rules for federal courts that borrow a state statute of limitations." *Dawson*, 4 F.3d at 1309.

Furthermore, the policy considerations that caused this Court to decide that state tolling law should be the primary guide when "borrowing" a state statute of limitations apply with far greater force when the court applies a state statute of limitations to a state law claim. As this Court explained in *Johnson*, a state statute of limitations cannot be understood without considering "the context of the various circumstances that suspend it from running against a particular cause of action." 421 U.S. at 463-64, 95 S.Ct. at 1722. In such cases, the federal court relies not only on the state's wisdom in setting limits, but on its judgment in providing exceptions to

those limits. *Johnson*, 421 U.S. at 463-64, 95 S.Ct. at 1722. In short, the Tenth Circuit's decision in *Bryan* does not conflict with the Fifth Circuit's decision in *Dawson*, and is not authority for the FDIC's contention that federal tolling principles should apply to state law claims.

C. A Federal Common Law Rule Is Inappropriate When Enforcing A State Law Claim.

The FDIC asks this Court to create a special rule requiring the application of federal tolling principles to state law claims. In arguing for this special rule, the FDIC relies on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979). That reliance is misplaced.

In *Kimbell Foods*, this Court decided not to adopt a federal common law rule on the priority of "contractual liens arising from certain federal loan programs . . . , in the absence of a federal statute setting priorities." *Id.* 440 U.S. at 718, 995 S. Ct. at 1453. In reaching that conclusion, this Court prescribed a two-prong test for determining whether to frame a federal common law rule. First, the court must "decide whether federal or state law governs the controversies." Only "if federal law applies" does the court balance the competing interests in order to determine "whether this Court should fashion a uniform . . . rule or incorporate state . . . law." *Id.* The FDIC in this case does not meet the first prong of *Kimbell Foods* test because state law applies to the claim. Thus the balancing test under *Kimbell Foods* is never reached.

Furthermore, unlike *Kimbell Foods*, the FDIC is not asking this Court to decide whether to fill the interstices in an extensive program of federal regulation by relying

on state law or by establishing a uniform federal common law rule. Rather, the FDIC asserts a cause of action that derives entirely from state law. Indeed, if it were not for Texas law, the FDIC would have no claim. *See FDIC v. Cocke*, 7 F.3d 396, 399 (4th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1483).

In support of its request for a federal common law rule, the FDIC urges a need for uniformity. Congress, however, did not choose to create a uniform federal law, but enabled the FDIC, as receiver for a failed bank, to bring whatever state law claims that the bank owned when the FDIC acquired the failed institution's assets.[4] As this Court explained in *Robertson v. Wegmann* "[t]his statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U.S. 584, 594 n.11, 98 S.Ct. 1991, 1997 n.11 (1978).

Congress, moreover, in making state statutes of limitations applicable to these claims, relied on the state's wisdom in setting limitations and exceptions to limitations. *Johnson*, 421 U.S. at 463-64, 95 S.Ct. at 1722 (a state statute of limitations cannot be understood absent "the context of the various circumstances that suspend it from running against a particular cause of action"). Indeed, state statutes of limitation are expressions of important

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[4] Similar arguments by the FDIC based on uniformity have not succeeded in other cases. *See, e.g., FDIC v. American Cas. Co.*, 995 F.2d 471 (5th Cir. 1993), *citing Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *FDIC v. American Cas. Co.*, 975 F.2d 677 (10th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695 (8th Cir. 1992); *American Cas. Co. v. FDIC*, 944 F.2d 455 (8th Cir. 1991).

legislative policies that should not be abrogated lightly, especially when the statute is being applied to a state law cause of action. *Dawson*, 4 F.3d at 1311-12 (citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). *See also Resolution Trust Corp. v. Seale*, 13 F.3d 850, 852 (5th Cir. 1994).

The FDIC nevertheless argues that it should not have to consider whether its claims expired "on a state-by-state basis." The FDIC, however, cannot escape examining state substantive law and statutes of limitations "on a state-by-state basis" when asserting state law causes of action. *See, e.g., Austrian*, 198 F.2d at 702 ("there can be no escape from the diverse periods of limitations set up in the various state statutes"). In these circumstances, the FDIC is not unduly burdened by examining the manner in which the state applies its statute of limitations to state law claims. Furthermore, the decision whether to apply an equitable doctrine is always a fact-intensive inquiry that necessarily requires case-by-case consideration. *See, e.g., Bryan* 902 F.2d at 1523 ("the relevant inquiry is inherently fact-specific").

According to the FDIC, this Court should frame a federal rule "that takes into account the special responsibilities of the officers and directors of federally insured institutions, [and] the role of the FDIC as receiver and guardian of the federal insurance fund." Congress undoubtedly took those interests into consideration when it chose to preserve the state's interest in the application of its own law to institutions and activities within the state's jurisdiction. *See, e.g., Austrian*, 198 F.2d at 702 (Congress intended to give effect to the "repose policy of

the state limitations periods . . . in the manner in which the various states saw fit to make this policy effective.").

In addition, the FDIC contends that state tolling law conflicts with the federal interest in winning suits against former officers and directors of failed institutions and thus adding to the federal coffers. That argument, however, could be made with regard to any state law unfavorable to the FDIC's position. State law does not become inapplicable merely because the FDIC may lose some of its cases. As one court explained, "there is nothing [in FIRREA] to indicate a Congressional policy that would justify the federal courts' applying a special rule 'trumping' state precedent for the benefit of the RTC." *RTC v. Hecht*, 833 F.Supp. 529, 531 (D.Md. 1993).

D. The Equitable Principles At Issue In O'Melveny Have No Application To This Case.

According to the FDIC, the Court should hold this petition until it decides *O'Melveny & Myers v. FDIC, cert. granted*, No. 93-489 (Nov. 29, 1993). The Court's disposition of *O'Melveny*, however, is unlikely to shed light on the proper analysis to be used in deciding this case.

The defendants in *O'Melveny* attempted to impute the bank's inequitable conduct to the FDIC as receiver. In rejecting this argument, the Ninth Circuit observed that equitable defenses that apply to the bank when it asserts a claim on its own behalf may not apply to the FDIC in its role as receiver of the failed bank's assets. The FDIC in this case, however, never acquired a claim free of infirmities, and cannot assert equities that apply to its role as receiver. *See, e.g., Guaranty Trust Co. v. United States*, 304

U.S. 126, 58 S.Ct. 785 (1938) (United States could not assert its equitable position as sovereign because it never acquired a claim free of infirmities). *See also Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events"). Nor does this case involve an attempt to impute inequitable conduct to the FDIC. Thus this court's decision in *O'Melveny* is unlikely to affect the well-established principle that state law determines the viability of a state law claim under a state statute of limitations.

CONCLUSION

The Fifth Circuit in this case merely applied state law to a state law claim as required under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1938). The Tenth Circuit's opinion in *Farmers & Merchants Nat. Bank v. Bryan*, which concerned the application of a state statute of limitations to federal statutory causes of action, does not conflict with that decision. Because a split in the circuits does not exist, and because this Court has ruled on the controlling principles, Respondent Kirk K. Weaver respectfully requests that this Court deny the Federal Deposit Insurance Corporation's petition for writ of

certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. MICHAEL DORMAN
Counsel of Record

JAMES E. ESSIG
JOHN RAINEY
LIDDELL, SAPP, ZIVLEY,
HILL & LABOON, L.L.P.
3400 Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200
(713) 223-3717 (FAX)

Counsel for Respondent
Kirk K. Weaver

APPENDIX A

BROWN MARONEY & OAKS HARTLINE
Attorneys

1300 Wortham Tower
2727 Allen Parkway
Houston, TX 77019
(723) 529-3110
Fax (713) 529-4639

1400 One Congress Plaza
111 Congress Avenue
Austin, TX 78701
(512) 472-5456
Fax (512) 479-1101

3012 Fairmont
Dallas, TX 75201
(214) 871-2121
Fax (214) 855-0806

April 24, 1990

Mr. Bill Ogden
Liddell Sapp, Zively, Hill
& LaBoon
3400 Texas Commerce Tower
Houston, Texas 77002

RE: Federal Deposit Insurance Corporation, Receiver of Texas Investment Bank, N.A. v. Rockleigh S. Dawson, Jr.; Kirk K. Weaver; Michael D. Maloy; and Wayne C. Desselle; In the United States District Court for the Southern District of Texas, Houston Division

Dear Mr. Ogden:

I understand from our telephone conference of April 20, 1990 that you will be representing Mr. Kirk Weaver in the above reference matter. **In response to you [sic] inquiry as to why Mr. Weaver was included as one of the defendants, please be advised that it is our information that Mr. Weaver served as a member of the loan committee and approved the loans which are the subject**

of the complaint without collateral or proper document, and despite the fact that the debtors were already in financial trouble.

This will also confirm that you have until May 18, 1990 to file an answer on behalf of Mr. Weaver.

Very truly yours,

/s/ Walter Clay Cooke by sc
Walter Clay Cooke

WCC/sl
cc: Frank Doremus
Wyman Elrod
Walt Mizell

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for Texas Investment Bank, N.A.,	§	
Plaintiff	§	CIVIL ACTION
	§	NO. H-90-1120
VS.	§	
ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, MICHAEL D. MALOY AND WAYNE C. DESSELLE,	§	
Defendants	§	

RESPONSE OF PLAINTIFF TO INTERROGATORIES OF DEFENDANT KIRK K. WEAVER

COMES NOW, Plaintiff Federal Deposit Insurance Corporation, Receiver for Texas Investment Bank, N.A. ("Receiver") and responds to the interrogatories of Defendant Kirk K. Weaver.

* * *

INTERROGATORY NO. 16:

Describe in detail the good faith investigation made by the Federal Deposit Insurance Corporation ("FDIC") prior to naming Kirk Weaver as a defendant in this lawsuit and state each and every fact and identify, in compliance with Instruction H(3) above, each and every document discovered by the FDIC supporting a good faith belief that Kirk Weaver:

(a) was a member of the Loan Committee referred to in paragraph 9 of the Amended Complaint;
(b) violated a duty of care to TIB.

RESPONSE: FDIC's investigation into the conduct of the officers and directors of TIB, including Weaver, began when TIB was closed on May 27, 1987. An FDIC investigation team led by Wyman Elrod was part of the FDIC closing team which entered TIB on May 27, 1987, immediately after the Comptroller of the Currency closed TIB. The investigation team interviewed officers and employees, inventoried and gathered bank documents, inventoried all desks, reviewed all criminal referrals, located and reviewed all bonds and director and officer liability policies, interviewed the OCC examiner in charge of the closing, read the minutes of the meetings of the board of directors for the preceding seven years, obtained copies of OCC examination reports, and began preparation of director profiles. A director profile indicates when the person served as a director, the board meetings the director attended, and the person's service on committees. From the investigation team's review of the minutes of the board meetings, they determined that Weaver was a member of the Executive and Loan Committee. Following the closing, the investigation team obtained asset searches on certain officers and directors, and reviewed the bond claim which was pending when TIB was closed. The minutes of the April 28, 1981 meeting of the board of TIB indicate Weaver was elected to the Loan and Discount Committee, and the minutes of the November 18, 1986 meeting of the board of TIB indicate the board approved an update of the TIB loan policy to

reflect that Weaver was a member of the Executive and Loan Committee and the Loan Committee. Evidence of Weaver's violation of his duty to TIB were found in the following documents:

(i) OCC Examination Report dated 6/29/84 and its cover letter from Stephen R. Steinbrink

(ii) OCC Examination Report dated 6/30/86

(iii) OCC Examination Report dated 1/31/85

(iv) OCC Examination Report dated 4/28/87

Watkins' affidavit contains additional evidence of FDIC's continued investigation into Weaver's conduct which clearly supports FDIC's good faith belief that Weaver violated a duty of care to TIB. **As the Receiver has admitted, it was incorrect in its original conclusion that Weaver was a member of the Loan Committee** at the time Desselle was engaged in his unsafe and unsound lending practices. However, Weaver was a member of

TIB's board of directors, and did violate his fiduciary and contractual duties to TIB as a board member.

Respectfully submitted,

/s/ Walter Clay Cooke
Walter Clay Cooke
Admissions No. 5417
State Bar No. 04759800
1300 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 525-6214
(713) 529-4639 (FAX)

ATTORNEY FOR PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR TEXAS INVESTMENT BANK, N.A.

OF COUNSEL:

BROWN MARONEY & OAKS HARTLINE
1300 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 529-3110

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Farmers & Merchants National Bank, Hennessey, Oklahoma,	)	CASE NO. 88-2845
Plaintiff - Appellee,	)	
vs.	)	
BRUCE A. BRYAN and ROBERT BRYAN,	)	
Defendants - Appellants.	)	

BRIEF OF APPELLANTS

(Filed Mar. 13, 1989)

APPEAL FROM THE UNITED
STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-85-1627-R

THE HONORABLE DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

WILLIAM C. McALISTER
of the firm PATE & PAYNE, P.C.
P.O. Box 1907
Oklahoma City, OK 73101-1907
(405) 235-4211
Attorneys for Appellants

* * *

ARGUMENT AND AUTHORITIES

PLAINTIFF, FDIC, FAILED TO PUT ON ANY EVIDENCE THAT STATUTE OF LIMITATIONS WAS TOLLED ON THE BASIS OF DOMINATION OF CONTROL AND THE COURT ERRED IN FAILING TO SUSTAIN THE MOTION FOR DIRECTED VERDICT FOR ALL CLAIMS BARRED BY THE STATUTE OF LIMITATIONS.

The applicable standard of review by this Court for this issue is a consideration of the adequacy or sufficiency of the evidence to support the position of the FDIC that the statute of limitations was tolled because the Bank was dominated by the officers charged.

This proceeding was initiated June 21, 1985. The defense was raised that all portions of claims arising from loans made more than three (3) years prior to such date were barred by the running of the applicable statute of limitations. It was contended on behalf of the FDIC that the statute of limitations was tolled under the adverse domination theory as to all claims by reason of Bruce A. Bryan having maintained the controlling interest in the Bank.

At the close of the evidence, counsel for the Defendants moved for a directed verdict based upon a contention that the FDIC had failed to introduce any evidence to support the adverse domination theory. The Court overruled the Motion for Directed Verdict in favor of the Defendants opining that the question of adverse domination would be a question of fact for the jury stating that he did not think there were sufficient facts either way to direct a verdict in favor of either the Plaintiff or the Defendants on such issue. (Tr. 5-24-88 at 49 and 50).

The claims for relief were based upon alleged violations of Federal Banking Statutes. 12 U.S.C. §§84 and 93. The applicable statute of limitations for such claims would fall under Oklahoma law. *Hughes vs. Reed,* 46 F.2d 435 (10th Cir. 1931). An action upon a liability created by statute must be brought within three (3) years after a claim accrues. 12 Oklahoma Statutes 1981 §95 Second. The claims based upon alleged improper loan activities accrued when the loans were funded. *Corsicana National Bank vs. Johnson,* 251 U.S. 68, 40 S.Ct. 82, 64 L.Ed. 141 (1919); *Hughes vs. Reed,* supra.

The evidence disclosed that at all times, there were members of the Board of Directors who were minority stockholders and not employed as officers of Farmers and Merchants National Bank, Hennessey, Oklahoma (the "Bank"). Among the outside director stockholders were Mr. Ronald Staggs who owned eight percent (8%) of the stock and Judge Robert Lovell who owned two percent (2%) of the stock. (Tr. 5-16-88 at 70 and 72). At the Board of Directors' meetings, there was free discussion of all loans and all issues confronting the Bank. (Tr. 5-18-88 afternoon session at 73 and 74). The loan committee included outside director, Judge Robert Lovell (Tr. 5-18-88 afternoon session at 84).

Judge Lovell and Mr. Staggs, the outside directors, questioned the officers concerning matters and criticisms in the bank examination reports. (Tr. 5-18-88 afternoon session at 100). Marjorie Bryan testified that the outside directors were there to find out about the activities of the loan officers. They had the opportunity to say whatever they wanted (Tr. 5-20-88 at 118).

Evidence was submitted that on occasion, the regional administrator for national banks had arranged to meet with the full Board of Directors concerning perceived problems of the Bank (Plaintiff's Exhibits 76 and 97).

When a statutory bar of limitations is properly invoked, the burden devolves upon the party seeking to avoid its effect to show the facts or acts which operate to toll the limitation. *Beatty vs. Scott,* 362 P.2d 699 (Okl. 1961). When the record discloses that such a burden is not met, a judgment based upon an action barred by limitation cannot stand. *H. F. Wilcox Oil & Gas Co. vs. Diffie,* 186 F.2d 683 (10th Cir. 1950).

A party seeking the benefit of rules in avoidance of the statute of limitations has the burden of proof to establish them. All presumptions are against such party, since the claim to exemption is against the current of the law and is founded on exceptions. *Akron Presform Mold Company vs. McNeil Corporation,* 496 F.2d 230 (6th Cir. 1974) cert. den. 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed. 2d 270 (1979). In the instant case, such burden of proof was not met. In the absence of proof of domination, it must be presumed that it did not exist.

In the case of *Wills vs. Black and West, Architects,* 344 P.2d 581 (Okl. 1959), it was concluded that the evidence was insufficient to submit to the jury the question of whether the statute of limitations had been tolled and where there is no evidence showing cause for tolling the statute, that the question of limitations is not one for the jury and the trial court should be affirmed where it sustains a demur to the evidence.

A Plaintiff who seeks to toll the statute of limitations on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *International Railways of Central America vs. United Fruit Company,* 373 F.2d 408 (2nd Cir. 1967) cert. den. 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed. 2d 975. In the case of *Moserian vs. Peat, Marwick, Mitchell & Co.,* 727 F.2d 873 (9th Cir. 1984) cert. den. 429 U.S. 931, 105 S.Ct. 329, 83 L.Ed. 2d 265, the District Court directed a verdict on all claims arising prior to the applicable statute of limitations having found no evidence on domination. In affirming such treatment, the Appellate Court stated they did not find any mention of domination or any facts from which domination could be reasonably inferred. It is submitted that in the instant case, the Court should have directed a verdict in favor of the Defendants dismissing all claims pertaining to loans funded prior to June 21, 1982, for the reason that there was no evidence submitted to establish that domination occurred.

THE COURT IMPROPERLY ADMITTED BANK EXAMINATION REPORTS AND ACCOMPANYING TRANSMITTAL LETTERS INTO EVIDENCE.

* * *

appears to compound the evidentiary problems. The Court should set aside the Judgment as it pertains to the claims or counts which are not barred by the applicable statute of limitations and remand such issues for a new trial.

Oral argument is desired on behalf of the Appellants. Oral argument would possibly assist the Court due to the

existence of relatively novel questions involved in a complex case.

/s/ William C. McAlister
WILLIAM C. McALISTER
of the firm Pate & Payne, P.C.
P.O. Box 1907
Oklahoma City, OK 73101-1907
(405) 235-4211
Attorneys for Defendants/
Appellants Bruce A. Bryan and
Robert Bryan

CERTIFICATE OF MAILING

This is to certify that on the 10th day of March, 1989, a true and correct copy of the above and foregoing instrument was mailed to Messrs. David L. Bryant, Gene C. Buzzard and James W. Rusher, of the firm Gable & Gotwals, 20th Floor, Fourth National Building, Tulsa, Oklahoma 74119, attorneys for Federal Deposit Insurance Corporation, as Receiver, with postage fully prepaid.

/s/ William C. McAlister

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-2845

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of Farmers & Merchants
National Bank, Hennessey, Oklahoma

Plaintiff-Appellee,

v.

BRUCE A. BRYAN and ROBERT BRYAN,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-85-1627-R
Honorable David L. Russell, United States District Judge

ANSWER BRIEF OF APPELLEE

Of Counsel:

A. T. Dill, III
FEDERAL DEPOSIT
INSURANCE
CORPORATION
550 17th Street, N.W.
Washington, D.C. 20429
(202) 898-3744

Gene C. Buzzard
David L. Bryant
James W. Rusher
GABLE & GOTWALS
2000 Fourth National
Building
Tulsa, Oklahoma 74119
(918) 582-9201

* * *

view the evidence in the light most favorable to the Plaintiff and give it the benefit of all reasonable inferences that could be drawn from the evidence. *Zimmerman v. First Federal Savings & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988); *Mackey v. Burke*, 751 F.2d 322, 324 (10th Cir. 1984); *Ford Motor Credit Co. v. Milburn*, 615 F.2d 892, 894 (10th Cir. 1980); *Kiner v. Northcutt*, 424 F.2d 222, 223 (10th Cir. 1970) (reversing a directed verdict in favor of plaintiff in a negligence action, noting that a directed verdict is justified "only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion").

Because the application of these rules is "always perplexing and necessarily subject to the human equation," *High Voltage Engineering Corp. v. Pierce*, 359 F.2d 33, 38 (10th Cir. 1966), this Court has said "we will not superimpose our second-hand judgment on the trial court unless we can say from our objective appraisal of all of the facts and circumstances that his judgment was clearly wrong," *Chicago, Rock Island and Pac. R. Co. v. Howell*, 401 F.2d 752, 755 (10th Cir. 1968) (*citing High Voltage*).

A. Plaintiff's Claims are Governed by a Three-Year Limitations Period.

In its January 12, 1988 order denying the Defendants' motion for partial summary judgment the trial court, citing *Hughes v. Reed*, 46 F.2d 435, 440-41 (10th Cir. 1931), held (Doc. 86 at 2) that **there is no federal statute of limitations applicable to the FDIC's federal law claims** and that the FDIC's claims are therefore governed by a borrowed state statute of limitations, namely 12 Okla.

Stat. §95 (Second), which creates a three-year limitations period for any "action upon a contract express or implied not in writing" and for any "action upon a liability created by statute other than a forfeiture or penalty."[1]

The Defendants contend that the Plaintiff's claims accrued, and the limitations period began to run, on the date each illegal or imprudent loan was made. They also contend that the statute of limitations ran continuously on all claims, from the dates the loan transactions occurred. Consequently, the Defendants argue that any claim based on a loan made before June 21, 1982 was barred by limitations when the Bank filed this action on June 21, 1985.

Because of the application of the "adverse domination" theory of tolling, discussed below, the statute had not run on any claim included in the action the Bank filed on June 21, 1985. This is the case because the Defendants' adverse domination of the Bank began no later than September 19, 1977, when Bruce Bryan bought a controlling interest in the Bank, and ended no earlier than June 21, 1984, when Bruce Bryan sold his controlling interest. Accordingly, when the domination period ended on June 21, 1984 (at the earliest), the statute even on loans made as early as July 1, 1976 (the earliest loan in question)

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[1] The Receiver's claims may actually be governed by 28 U.S.C. §2415(a), which specifies a six-year limitations period for every action for money damages which is brought by a federal agency and which is "founded upon any contract express or implied in law or fact." The Oklahoma statute which the Tenth Circuit applied in *Hughes v. Reed* is the counterpart of 28 U.S.C. §2415(a). However, 28 U.S.C. §2415(a) did not exist at the time *Hughes v. Reed* was decided.

could not have been running for more than 15 months, and when the Bank filed suit on June 21, 1985, the statute could not have been running for more than 27 months, because it was tolled while the Defendants controlled the Bank.

B. "Adverse Domination" Tolls a Statute of Limitations on Claims Against the Culpable Directors and Officers of a Bank.

Under the doctrine of "adverse domination" claims against bank or other corporate directors and officers for breaches of their duties do not necessarily accrue at the time the breaches occur, *i.e.*, at the time illegal or imprudent loans are made and approved. If culpable directors and officers are in control of the institution when the breaches of duty occur, the claims do not accrue, and any applicable limitations period does not begin to run, until the culpable directors and officers relinquish control. *See, e.g., Michelsen v. Penney,* 135 F.2d 409 (2nd Cir. 1943); *Adams v. Clarke,* 22 F.2d 957 (9th Cir. 1927); *FDIC v. Hudson,* 673 F. Supp. 1039 (D. Kan. 1987); *FDIC v. Dempster,* 637 F. Supp. 362 (E.D. Tenn. 1986); *FSLIC v. Williams,* 599 F. Supp. 1184 (D. Md. 1984); *FDIC v. Buttram,* 590 F. Supp. 251 (N.D. Ala. 1984); *FDIC v. Bird,* 516 F. Supp. 647 (D. P.R. 1981). This rule has strong legal and practical bases.

The adverse domination doctrine is a product of the modern view that a statute of limitations governing claims against corporate directors and officers should be tolled as long as the culpable directors control the corporation so as to effectively prevent it from bringing suit on

its claims. *See* 3A *Fletcher's Encyclopedia of Corporations* §1306.2 (1975); W. E. Knepper & D. Bailey, *Liability of Corporate Officers and Directors* at 355 (3rd ed. 1988). The doctrine serves the interests of the injured entity, and prevents the wrongdoers from profiting from their own practical influence over the timing of a suit brought against them.

In its order denying the Defendants' motion for partial summary judgment, the trial court adopted the adverse domination theory of tolling, saying:

> "The Court finds the logic of the 'adverse domination doctrine' compelling and adopts it as federal common law for purposes of determining when **the federal claims made actionable under 12 U.S.C. § 93** accrued and when the borrowed state statute of limitations applicable thereto begin [sic] to run.
>
> *Hughes v. Reed* is not contrary; in that case the adverse domination doctrine was not raised nor specifically addressed by the Tenth Circuit. To the extent that the Tenth Circuit's focus upon active concealment as an 'exception' to the state statute of limitations, *see* 46 F.2d at 441, implies that that is the only 'exception' or tolling doctrine recognized by the Tenth Circuit, this Court is of the opinion that the Tenth Circuit would not now adopt such a view but would find the substantial contemporary authority recognizing adverse domination as a federal tolling doctrine persuasive." (Doc. 86 at 3).

We submit that the trial court was correct.

* * *

Respectfully submitted,

/s/ David L. Bryant
Gene C. Buzzard
David L. Bryant
James W. Rusher
GABLE & GOTWALS
2000 Fourth National Building
Tulsa, Oklahoma 74119
(918) 582-9201

Attorneys for FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Farmers & Merchants National Bank, Hennessey, Oklahoma

Of Counsel:

A. T. Dill, III
FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street, N.W.
Washington, D.C. 20429
(202) 898-3744